Supreme Court, U.S.
FILED
JUL 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-132

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

ALBERT NEUMANN, *et al.*,
Petitioner,

v.

REINFORCED EARTH COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WAYNE M. MANSULLA
ASHCRAFT & GEREL
2000 L Street, N.W.
Suite 700
Washington, D.C. 20036
Counsel for Petitioner

CASILLAS PRESS INC. - 1717 K Street NW Washington DC - 223-1220

QUESTIONS PRESENTED

I. Whether the Circuit Court erroneously interpreted the jury findings when it held that Neumann failed to establish RECO's share of the relevant market absent a showing of monopoly power.

II. Whether the evidence and all reasonable inferences therefrom, when viewed in a light most favorable to Neumann, would lead reasonable men to differ as to whether there was a dangerous probability that RECO could have attained monopoly power, such that judgment notwithstanding the verdict was improper.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

RELEVANT STATUTES 2

STATEMENT OF THE CASE 3

ARGUMENT

I. The Court's Determination That Neumann Could Not Establish RECO's Share Of The Relevant Market Sufficient To Support A Finding Of Attempted Monopolization Was Based On An Erroneous Interpretation Of The Jury's Findings 5

II. The Court Must Protect The Jury's Finding That There Was A Dangerous Probability Of RECO Obtaining Monopoly Power In The Relevant Market 8

III. The Instant Case Is A Proper One For Review By This Court 10

CONCLUSION 13

Appendix A
Order of the United States Court of Appeals for the District of Columbia Circuit Denying Petition for Rehearing 1a

Appendix B
Decision and Order of the United States Court of Appeals for the District of Columbia Circuit 2a

Page

Appendix C
Decision and Order of the United States District Court for the District of Columbia 14a

Appendix D
Relevant Portions of Trial Transcript 31a

TABLE OF AUTHORITIES

Cases: Page

Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509 (10th Cir. 1984) *aff'd* 105 S.Ct. 2847 (1985) 10

Association for Intercollegiate Athletics for Women v. N.C.A.A., 735 F.2d 577 (D.C. Cir. 1984) 10, 11

American Key Corp. v. Cole Nat'l Corp., 762 F.2d 1569 (11th Cir. 1985) 10

Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227 (1st Cir. 1983) 10

Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) 8, 10

Borough of Landsdale v. Philadelphia Elec. Co., 692 F.2d 307 (3d Cir. 1982) 10

Cal. Computer Products v. Int'l Business Machines, 613 F.2d 727 (9th Cir. 1979) 11

Deauville Corp. v. Federated Dept. Stores, Inc., 756 F.2d 1183 (5th Cir. 1985) 11

Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480 (5th Cir. 1984) 10

Page

Feinstein v. Nettleship Co. of Los Angeles,
714 F.2d 928 (9th Cir. 1983), *cert. denied,*
104 S.Ct. 1984 10

FLM Collision Parts, Inc. v. Ford Motor Co.,
543 F.2d 1019 (2d Cir. 1976), *cert. denied,*
429 U.S. 1097 (1977) 10

Flores v. Pierce,
617 F.2d 1386 (9th Cir. 1980), *cert. denied,*
449 U.S. 875 (1980) 9

Gillham v. Admiral Corp.,
523 F.2d 102 (6th Cir. 1975), *cert. denied,*
424 U.S. 913 (1976) 8

Lorain Journal Co. v. United States,
342 U.S. 143 (1951) 8, 11

National Reporting Co. v. Alderson Reporting Co., Inc.,
763 F.2d 1020 (8th Cir. 1980) 11

Neumann v. Reinforced Earth Co.,
594 F. Supp. 139 (D.D.C. 1984) 2

Neumann v. Reinforced Earth Co.,
786 F.2d 484 (D.C. Cir. 1986) 2, 5

Neumann v. Vidal,
710 F.2d 856 (D.C. Cir. 1983) 4

Otter Tail Power Co. v. United States,
410 U.S. 366 (1973) 11

Sargent-Welch Scientific Co. v. Ventron Corp.,
567 F.2d 701 (7th Cir. 1977) 10

Selle v. Gibb,
741 F.2d 896 (7th Cir. 1984) 9

Smith v. Northern Michigan Hospitals, Inc.,
703 F.2d 942 (6th Cir. 1983) 10

Superturf, Inc. v. Monsanto Co.,
660 F.2d 1275 (8th Cir. 1981) 10

Swift & Co. v. United States,
196 U.S. 375 (1905) 6, 8, 11

United States v. E.I. duPont de Nemours & Co.,
351 U.S. 377 (1956) 10

United States v. Grinnell Corp.,
384 U.S. 563 (1966) 6, 9

Walker Process Equip., Inc., v. Food Mach. and Chemical Corp., 382 U.S. 172 (1965) 11

Statutes:

15 U.S.C. § 2 (1973) 2

28 U.S.C. § 1254(1) (1948) 2

15 U.S.C. § 15(a) (1976) 3

Other Authorities:

III P. Areeda & D. Turner, *Antitrust Law* (1978) 8

1 M. Handler, *Twenty-five Years of Antitrust* (1973) 10

L. Sullivan, *Handbook of the Law of Antitrust* (1977) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. -

ALBERT NEUMANN, *et al.*,
Petitioner,

v.

REINFORCED EARTH COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners[1] respectfully request that this Court grant a Writ of Certiorari to review the Decision and Order of the United States Court of Appeals for the District of Columbia Circuit affirming judgment in favor of respondent, Reinforced Earth Company, and denying a Petition for Rehearing, 786 F.2d 424 (D.C. Cir. 1986), *reh'g denied*, No. 84-5532 (D.C. Cir. April 29, 1986).

[1]The parties below included Albert Neumann, Columbia Engineering Services, Inc., and Retaining Wall Systems, Inc.

OPINIONS BELOW

In this antitrust action, the United States District Court for the District of Columbia granted a judgment notwithstanding the verdict in favor of the defendant, Reinforced Earth Company. *Neumann v. Reinforced Earth Co.*, 594 F. Supp. 139 (D.D.C. 1984) (Appendix C). The United States Court of Appeals for the District of Columbia Circuit affirmed the District Court's ruling. *Neumann v. Reinforced Earth Co.*, 786 F.2d 484 (D.C. Cir. 1986) (Appendix B). The Circuit Court subsequently denied appellant's Petition for Rehearing. (Appendix A).

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit decided this case on March 25, 1986. A timely Petition for Rehearing was filed and the Court denied the petition on April 29, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1948).

RELEVANT STATUTES

The relevant statutory provisions are as follows:

> Section 2 of the Sherman Act, 15 U.S.C. 2, provides:
>
> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dolalrs, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 4 of the Clayton Act, 15 U.S.C. 15(a), provides in pertinent part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district . . . in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

Petitioners, Albert Neumann, Columbia Engineering Services, Inc., and Retaining Wall Systems, Inc., commenced this antitrust action against the respondent, Reinforced Earth Company ("RECO") pursuant to the Sherman Act, 15 U.S.C. § 2 (1973). Neumann and his corporations had been attempting to market a new type of retaining wall system known as "Tension Retaining Earth System" ("TRES") in competition with a patented system known as "Reinforced Earth", marketed for many years by RECO.

Neumann applied for a patent for his retaining wall system and RECO, upon hearing of Neumann's plans, began a series of legal proceedings against Neumann in the United States District Court for the District of Maryland and the United States Patent Office. These legal proceedings formed the basis of Neumann's complaint against RECO in the United States District Court for the District of Columbia, alleging abuse of process and antitrust violations in the form of sham litigation and an attempt to monopolize or actual monopolization.

On May 27, 1982, the district judge granted summary judgment for RECO. The United States Court of Appeals

for the District of Columbia Circuit reversed and remanded. *See Neumann v. Vidal,* 710 F.2d 856 (D.C. Cir. 1983).

After a three-week trial, the jury found that RECO's litigation in the patent office was a sham and that RECO had filed it in an attempt to monopolize the retaining wall market. The jury also concluded that the Maryland litigation was not a sham and that there had been no actual monopolization. Plaintiffs were awarded $1 million in damages.

RECO subsequently moved for judgment notwithstanding the verdict. On July 5, 1985, the trial judge granted the motion finding, *inter alia,* that Neumann had failed to prove as a matter of law that RECO's share of the market was too small to support the jury's finding of attempted monopolization.

Neumann appealed and on March 25, 1986, the United States Court of Appeals for the District of Columbia Circuit affirmed the judgment of the District Court. The Circuit Court specifically held that Neumann failed to show what RECO's share of the relevant market was. Such failure "condemned Neumann's market to legal insufficiency," unless RECO's market power could be demonstrated by other means. The Court further reasoned that, because the jury found insufficient evidence of monopoly power and monopolization, Neumann could not "meet his burden of establishing a relevant market against which his claim of attempted monopolization could be tested."

Neumann filed a timely Motion for Rehearing. The Court denied this motion on April 29, 1986.

ARGUMENT

THE COURT'S DETERMINATION THAT NEUMANN COULD NOT ESTABLISH RECO'S SHARE OF THE RELEVENT MARKET SUFFICIENT TO SUPPORT A FINDING OF ATTEMPTED MONOPOLIZATION WAS BASED ON AN ERRONEOUS INTERPRETATION OF THE JURY'S FINDINGS.

The Court's rationale to support its finding that Neumann failed to sufficiently establish RECO's share of the relevant market against which a claim of attempted monopolization could be tested confuses the jury's separate findings with regard to monopolization and attempted monopolization. The Court first noted that the jury received three definitions of possible markets for its consideration. *Neumann v. Reinforced Earth Co.*, 786 F.2d 424, 429 (D.C. Cir. 1986). However, the Court held that "there is no means of discovering which one the jury chose, if, indeed it chose any of the three." *Id.*

The Court then asserted a separate ground upon which to affirm the district court's granting of judgment n.o.v. in favor of RECO. The Court explained that Neumann had offered alternative market definitions to the jury, the first of which the Court found to be inadequate as a matter of law. *Id.* With respect to Neumann's second market definition, the Court held that it was legally insufficient since Neumann had failed to demonstrate RECO's share of that market:

> This failure condemned Neumann's market to legal insufficiency, unless RECO's market power could be demonstrated in some other manner. Neumann insists that he did precisely this by producing evidence that RECO was able, among other things, to control prices and restrict entry. The jury verdict forecloses that argument.

> When asked on the special verdict form "Do you find from a preponderance of the evidence that [RECO] had monopoly power in the relevant market, that is, the ability to control price and exclude competition?", the jury answered "No."
>
> It is clear, therefore, that Neumann failed to meet his burden of establishing a relevant market against which his claim of attempted monopolization could be tested.

Id. at 430. The Court's reading of the portion of the jury verdict quoted above is incorrect and its consequent decision is in error.

Plaintiff's complaint alleged both "monopolization" and "attempted monopolization." To prove monopolization, it must be shown that the defendant had "monopoly power" in the relevant market, *i.e.,* the ability to control price and exclude competition. *United States v. Grinnell Corp.,* 384 U.S 563, 570 (1966). Attempted monopolization involves a lesser standard. Actual monopoly power need not be proved. It must only be shown that there was a "dangerous probability" that defendant would achieve monopoly power in the relevant market. *Swift & Co. v. United States,* 196 U.S. 375, 396 (1905).

The jury found, by a series of special verdicts in response to questions put by the trial court, that defendant had not monpolized but had attempted to monopolize a market for retaining walls. The special verdict form was divided into six sections, each with a different subject heading, and several separate questions were asked under each heading. Two of the headings were "B. *Monopolization"* and "C. *Attempted Monopolization".* The question and answer relied upon by the Circuit Court was question 4 under the subject heading "B. *Monopolization".* That question and answer were as follows:

4. Do you find from a preponderance of the evidence that Reinforced Earth had monopoly power in the relevant market, that is, the ability to control price and exclude competition?

   (a) Yes. ____
   (b) No. X

This finding was directed solely to the issue of monopolization, as both the subject heading "B. *Monpolization"* and the use of the term "monopoly power" in the question itself make absolutely clear. The jury's response to the question, therefore, did not preclude the possibility that RECO, while lacking monopoly power and thus not liable for *actual* monopolization, nevertheless may have yet had a sufficient degree of power over prices and entry to have engaged in *attempted* monopolization.

The jury found that RECO did have such power. This is made clear by the jury's response to questions 6 and 7 under the subject heading "C. *Attempted Monopolization".* Those questions and the jury's responses were as follows:

6. . ., . [D]o you find from a preponderance of the evidence that Reinforced Earth had a specific intent to monopolize the relevant market?

   (a) Yes. X
   (b). No. ____

7. If your answer to question 6 is "yes", do you find from a preponderance of the evidence that there was a dangerous probability that Reinforced Earth would achieve monopoly power in the relevant market?

   (a) Yes. X
   (b) No. ____

These answers necessarily reflect a finding by the jury that RECO, while lacking the absolute power of a monopolist, did have sufficient market power to engage in "attempted monopolization" and to create a "dangerous probability" of ultimately achieving monopoly power.

The law is clear that the "dangerous probability" element of the offense of attempted monopolization is satisfied by a showing *short* of existing monopoly power. *Lorain Journal Co. v. United States,* 342 U.S. 143, 153 (1951); *Swift & Co. v. United States,* 196 U.S. 375, 396 (1905); *see generally,* III P. Areeda & D. Turner, *Antitrust Law* ¶¶ 831, 835(a) (1978). The Court below correctly instructed the jury to this effect (Appendix D at 39a), and the jury was thus correctly permitted to find RECO liable for attempted monopolization even after finding that RECO was not liable for monopolization because it did not possess actual monopoly power. The Court's decision overlooks that distinction and thereby commits clear error.

II.

THE COURT MUST PROTECT THE JURY'S FINDING THAT THERE WAS A DANGEROUS PROBABILITY OF RECO OBTAINING MONOPOLY POWER IN THE RELEVANT MARKET.

As discussed above, the jury found in response to a special verdict form that RECO had a dangerous probability of obtaining monopoly power in the relevant market. The jury having so found, the Court must protect that verdict unless the evidence and all reasonable inferences viewed in a light most favorable to Neumann are so one-sided that reasonable men could not differ. *Berkey Photo, Inc. v. Eastman Kodak Co.,* 603 F.2d 263, 305 (2d Cir. 1979), *cert. denied,* 444 U.S. 1093 (1980); *see also Gillham*

v. Admiral Corp., 523 F.2d 102, 109 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976); *Selle v. Gibb*, 741 F.2d 896, 900 (7th Cir. 1984); *Flores v. Pierce*, 617 F.2d 1386, 1389 (9th Cir. 1980), *cert. denied*, 449 U.S. 875 (1980). There clearly is evidence which would allow reasonable men to differ.

Monopoly power is defined as the power to control prices and/or exclude competition. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966). In this case, there was a tremendous amount of evidence that RECO had controlled prices and that RECO had excluded competitors. The evidence clearly showed that conventional retaining walls could not compete with RECO's 20-50% cost advantage. Furthermore, RECO clearly had the power through its patent to keep out new competitors who sought to enter the market using a similar revolutionary earth reinforcement system.

Neumann also provided expert testimony upon which a jury could find that RECO was dangerously close to haveing monopoly power in the retaining wall market. For instance, one of Neumann's experts testified that in 1977, when Neumann sought to enter the market, there were no other retaining wall systems as compared to later years. (Appendix D at 35a-36a). Moreover, of those retaining wall systems that became competitive with RECO in late 1979 or 1980, most were under a license from RECO. (Appendix D at 31a-35a, 36a-39a).

Thus, there was abundant evidence in the record on which the jury could base its finding. The Court's opinion does not dispute this; it holds, however, that the jury found to the contrary. But as shown above, the finding the Court relied on was addressed solely to the issue of whether defendant had monopoly power, not whether it had a sufficient degree of market power to create a "danger-

ous probability" that it would ultimately achieve monopoly power.

When the evidence at trial and all reasonable inferences are viewed in a light most favorable to Neumann, the evidence is clearly not so one-sided that reasonable men could not differ as to whether there was a dangerous probability that RECO could have obtained monopoly power in the retaining wall market. That being the case, the Court improperly affirmed the judgment n.o.v. in favor of RECO.

III.

THE INSTANT CASE IS A PROPER ONE FOR REVIEW BY THIS COURT.

The courts have been consistently clear about the relationship between monopoly power and monopolization. There is little argument over the principle that existence of monopoly power — the power to control prices or exclude competition — is the primary requisite to a finding of monopolization. *Berkey Photo, 603 F.2d at 272, citing United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956) and 1 M. Handler, *Twenty-five Years of Antitrust* 691 (1973). Indeed, all the federal circuit courts have adopted this basic rule of antitrust law.[2]

[2]*See, e.g., Association for Intercollegiate Athletics for Women v. N.C.A.A.*, 735 F.2d 577 (D.C. Cir. 1984); *Feinstein v. Nettleship Co. of Los Angeles*, 714 F.2d 928 (9th Cir. 1983) *cert. denied*, 466 U.S. 972 (1984); *American Key Corp. v. Cole Nat. Corp.*, 762 F.2d 1569 (11th Cir. 1985); *Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701 (7th Cir. 1977); *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480 (5th Cir. 1984); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983); *Smith v. Northern Michigan Hospitals, Inc.*, 703 F.2d 942 (6th Cir. 1983); *Superturf, Inc. v. Monsanto Co.*, 660 F.2d 1275 (8th Cir. 1981); *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); *Borough of Lansdale v. Philadelphia Elec. Co.*, 692 F.2d 307 (3d Cir. 1982); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509 (10th Cir. 1984), *aff'd* 105 S.Ct. 2847 (1985).

On the other hand, the scope of the offense of an attempt to monopolize remains much less clear. L. Sullivan, *Handbook of the Law of Antitrust* § 50 at 134 (1977). This is due in part to the fact that the offense is generally alleged in conjunction with monopolization and the analytic focus is typically placed on the monopolization charge. *Id.* Even in a case where the substantive charge involved an attempt to monopolize, this Court simply stated with no further clarification that the "[u]se of monopoly power 'to destroy threatened competition' is a violation of the 'attempt to monopolize' clause of § 2 of the Sherman Acts." *Otter Tail Power Co. v. United States,* 410 U.S. 366, 377 (1973) (citations omitted). What this Court did not address, however, was what conduct short of the use of monopoly power constitutes a violation of an attempt to monopolize.

Despite such lack of clarification, there is uniform agreement that monopoly power is not a necessary element of an attempt to monopolize. *Swift and Co. v. United States,* 196 U.S. 375, 396 (1905). *See also Cal. Computer Products v. Int'l Business Machines,* 613 F.2d 727, 737 (9th Cir. 1979); *National Reporting Co. v. Alderson Reporting Co., Inc.,* 763 F.2d 1020, 1024 (8th Cir. 1980). A defendant is not required to have attained monopoly power. Instead, a defendant must only have a dangerous probability of succeeding in destroying competition or controlling prices. *Cal. Computer Products,* 613 F.2d at 737; *Association for Intercollegiate Athletics for Women v. N.C.A.A.,* 735 F.2d 577 (D.C. Cir. 1984); *Deauville Corp. v. Federated Dept. Stores, Inc.,* 756 F.2d 1183 (5th Cir. 1985). Moreover, attempt to monopolize is an offense separate and distinct from actual monopolization. *See, e.g., Walker Process Equip., Inc. v. Food Mach. and Chemical Corp.,* 382 U.S. 172 (1965); *Lorain Journal Co.*

v. United States, 342 U.S. 143 (1951). The circuit court's decision, however, blurs this well-settled distinction.

In the instant case, the Court applied the test for monopolization – that is, the attainment of monopoly power – to the jury's findings regarding attempt to monopolize. Thus, the Court apparently confused a monopolization analysis with an analysis of an attempt to monopolize. Such an error simply reinforces Professor Sullivan's concern, discussed *supra,* over the lack of clarity with regard to the scope of an attempt to monopolize.

If the Court's error is left to stand, it will become increasingly difficult to meaningfully distinguish the offense of attempt to monopolize from monopolization itself. An already cloudy area of the law of monopoly will become even cloudier. Accordingly, this Court should seize this opportunity to articulate a clear ruling about the scope of the attempt to monopolize.

Finally, a clear understanding of the nexus between monopoly power and the separate offenses of monopolization and attempt to monopolize is central to an antitrust decision. The Court's decision, if left uncorrected, will muddle this issue rather than clarify it. Furthermore, the decision is in direct contravention of well-established precedent which holds that a finding of monopoly power is not necessary to support a finding of an attempt to monopolize. For these reasons, this Court should review the decision of the United States Court of Appeals for the District of Columbia Circuit.

CONCLUSION

For each and all the reasons set forth above, petitioner respectfully urges this Honorable Court to grant the petition for a writ of certiorari.

Respectfully submitted,

By _____

Wayne M. Mansulla
2000 L Street, N.W., Suite 700
Washington, D.C. 20036
(202) 783-6400
Counsel for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5532 September Term, 1985

Albert Neuman, et al. CA No. 81-00459

v.

Henri Vidal, et al.

BEFORE: Ginsburg and Bork, Circuit Judges; McGowan, Senior Circuit Judge

ORDER

Upon consideration of appellants' petition for rehearing, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT
GEORGE A. FISHER, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

APPENDIX B

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5532

ALBERT NEUMANN, et al., Appellants

v.

THE REINFORCED EARTH COMPANY

Appeal from the United States District Court for the District of Columbia

(Civil Action No. 81-00459)

Argued May 24, 1985

Decided March 25, 1986

Wayne M. Mansulla, with whom *Robert A. Taylor, Jr., Michelle A. Parfitt, James M. Hanny, Jerry D. Anker* and *Ann Adams Webster* were on the brief for appellants.

Richard McMillan, Jr., with whom *Adrienne J. Davis* was on the brief for appellees.

Before: Ginsburg and Bork, *Circuit Judges,* and McGowan, *Senior Circuit Judge.*

Opinion for the Court filed by *Circuit Judge* Bork.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Bork, *Circuit Judge:* This is an appeal from a judgment notwithstanding the verdict entered by the district court in favor of the defendant, now the appellee, Reinforced Earth Company ("RECO"). Appellants, Albert Neumann, *et al.*, seek reinstatement of the jury's finding that RECO violated section 2 of the Sherman Act by attempting to monopolize a market for retaining walls. That attempt, the jury found, consisted of engaging in "sham litigation" against Nueman and his company in order to keep them out of the market. Because we find that appellants failed to define a proper relevant market at trial, as they were required to do, we affirm the ruling of the district judge.

I.

RECO was founded in 1971 to market a patented technology for building retaining walls. Retaining walls keep earth masses in place and are commonly used in the construction of highways and bridges, but have other applications as well. From 1971 to 1976, Neumann, an independent contractor, did drafting work for RECO. In 1976, Nuemann terminated that relationship and formed a company to work on his own retaining wall design. After developing his Tension Retaining Earth System ("TRES"), Neumann applied for a patent. A design owner needs a patent so that contractors who wish to use the design must pay royalties.

When RECO learned of Neumann's patent plans and of a demonstration TRES wall he had built, it began a series of lengthy and complex legal proceedings against him. Neumann claims RECO knew these proceedings were without merit, hence sham litigation designed solely to keep him out of the retaining wall market. In the view we take of this appeal, it is not necessary to rehearse the intricacies of these proceedings and we merely outline them.

In February, 1977, RECO sued Newmann in federal district court in Maryland, alleging misappropriation of trade secrets, trademark infringement, unfair competition, and breach of a fiduciary relationship. While the suit was pending, Neumann's patent became due to issue. RECO moved for an injunction against issuance. By agreement of the parties, RECO dropped this motion and instituted a protest in the Patent Office.

On June 5, 1978, the Maryland court ruled that despite certain similarities, Neumann's wall and the RECO wall he allegedly copied "are based on completely different mechanical principles." Appellants' Record Excerpts at 92. The court rejected all of RECO's claims except one, holding that RECO was entitled to an injunction against future disclosure of trade secrets and confidential information contained in drawings and documents Neumann had retained and against any use by Neumann of certain confidential calculations and designs. *Id.* at 106.

The Patent Office proceedings – which had been held in abeyance pending the outcome of the Maryland suit – then went forward. In response to RECO's protest, the Patent Office withdrew Neumann's patent from issue for closer examination "because newly discovered prior art raises serious questions of patentability." Appellee's Record Excerpts at 32. There followed complicated proceedings involving a number of issues. Suffice it to say that RECO, although very persistent in filing allegations, fared badly. All of its contentions were ultimately rejected by the Patent Examiner and by an Assistant Commissioner. Neumann's patent issued in July, 1982.

Neumann filed the present action during the patent protest's pendency. On May 27, 1982, the district judge granted summary judgment for RECO. He dismissed Neumann's antitrust claims on the ground that Neumann fail-

ed to show either his experience in the retaining wall business or his ability to obtain financing, and therefore did not establish that he was actually prepared to enter the market. The court dismissed the common law abuse-of-process claims (analogous to the present "sham litigation" contentions) on the ground that Neumann was barred by res judicata and was equitably estopped from challenging the patent protest by his acquiescence in the protest's initiation. On June 21, 1983, this court reversed and remanded. *See Neumann v. Vidal,* 710 F.2d 856 (D.C. Cir. 1983).

A jury trial was conducted and on March 28, 1984, the jury concluded that there had been no actual monopolization and that the Maryland suit had not been a sham. The jury, however, found that the patent protest was a sham and that RECO had filed it in an attempt to monopolize the market for retaining walls and awarded Neumann damages of $1 million. *See* Appellants' Record Excerpts at 69-73.[1] On July 5, 1985, the trial judge entered judgment for RECO notwithstanding the verdict. *Id.* at 16. The district judge offered four reasons for granting RECO's judgment n.o.v. motion. He held Neumann had failed to prove: (1) the patent protest was a sham; (2) a "dangerous probability" that RECO's actions could win it a monopoly; (3) standing; and (4) damages. Because we find the second reason adequate to support the district court's judgment, we have no occasion to examine the others.

---

[1]With respect to the common law abuse-of-process claim, the jury specifically found that neither the Maryland suit nor the patent protest constituted an abuse of process. Joint Appendix at 72. This finding was not disturbed by the trial judge and was not presented to us on appeal.

II.

Section 2 of the Sherman Act, 15 U.S.C. § 2 (1982), provides, among other things, that it is unlawful to "attempt to monopolize . . . any part of the trade or commerce among the several States." Section 4(a) of the Clayton Act, 15 U.S.C. § 15(a) (1982), creates a private right of action in any person "injured in his business or property" by reason of any antitrust violation.

It will be useful to put the concepts of predation, sham litigation (which is a subcategory of predation), and attempted monopolization in their legal context. It is now settled, despite doubts created by some earlier decisions, that a company does not "monopolize" by growing at the expense of rivals due to its superior efficiency. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). It follows that a competitor does not commit the offense of attempting to monopolize by attempting to grow through efficiency. When the law speaks of attempts to monopolize it generally refers to predation. Predation involves the deliberate seeking of monopoly power by means other than superior efficiency, by means that would not be employed in the normal course of competition. Thus, predation involves aggression against business rivals through the use of business practices that would not be considered profit maximizing except for the expectation that (1) actual rivals will be driven from the market, or the entry of potential rivals blocked or delayed, so that the predator will gain or retain a market share sufficient to command monopoly profits, or (2) rivals will be chastened sufficiently to abandon competitive behavior the predator finds threatening to its realization of monopoly profits.

An extensive theoretical and empirical literature has grown up concerning methods of predation and the condi-

tions under which it may occur. We need not enter into the complexities of that debate because Neumann alleged a technique – predatory litigation – about whose existence there is no theoretical or empirical doubt.[2] Special problems arise, however, when the technique of predation alleged is an approach to an arm of government, such as a court or an agency. Citizens have a first amendment right to petition government for action on their behalf and government needs the information and suggestions that parties bring it even when those parties act out of self-interest.[3] For that reason, the law requires that litigation be a "sham" before it may be held to constitute a violation of the Sherman Act. It is not enough to be found to have attempted to monopolize that the party's sole intent in bringing an action is to exclude a rival from the market. The

---

[2]Doubts have been expressed about the frequency, or even the existence, of much alleged predatory behavior because of the great costs such behavior inflicts upon the predator. Predatory price-cutting, for example, requires the would-be monopolist to expand output, and so depress the market price, sufficiently to make the intended victim lose money. The difficulty is that the predator must also sell at a loss and to a much larger part of the market, particularly if the victim cuts back production during the period of the assault. This fact makes price-cutting a relatively unappealing mode of aggression. Sham litigation, however, does not suffer from this drawback since the litigation costs of the predator need not be any larger than those of the victim, either proportionately or absolutely. There is, in addition, the prospect that a court or agency order may keep the victim from operating at all until the litigation is concluded, when, since the litigation is a sham, the victim, if it survives, will presumably win.

[3]Viewing the matter from a perspective congenial to antitrust policy, it may be said that the possession of legal rights contributes to a company's efficiency in the same way that possession of any other asset does, so that the legitimate assertion of a legal right against a competitor, however, damaging to the competitor, or even to competition, that may be, does not constitute monopolizing or attempting to monopolize within the meaning of the Sherman Act.

patent laws, involved here, give the right to do just that for reasons of economic efficiecny. *See* W. Bowman, *Patent and Antitrust Law* 2 (1973). It is also an element of the offense that the party demonstrate knowledge that its legal proceeding is without merit. The development of doctrine on this topic may be found in the Supreme Court's decisions in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); and *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), and 417 U.S. 901 (1974), *summarily aff'g* 360 F. Supp. 451 (D. Minn. 1973).

Neumann claims that RECO tried to keep him from the market with sham litigation in the Patent Office and is therefore guilty of an attempt to monopolize. But even if the litigation was a sham, a point we do not decide, Neumann must still prove the other elements of an illegal attempt to monopolize. He must prove that the defendants' action created a "dangerous probability" that a monopoly would be achieved. *See Swift & Co. v. United States*, 196 U.S. 375, 396 (1905). Before a court can find that such a probability exists, the would-be monopolist must possess "a measure of power in the relevant market." 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 831, at 336 (1978). Power in a market is determined, at least in large part, by the share of that market held. *See United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966). Areeda & Turner suggest that a share of 30% or less presumptively disproves requisite power. 3 P. Areeda & D. Turner, *supra*, ¶ 835c, at 350. Perhaps a higher threshold could be justified but in this case the location of the threshold does not matter.

It might be argued that there should be no need to prove the element of market power, or a dangerous probability of success, separately. If a tactic, including litigation, is really predatory (*i.e.*,in this case a sham: known to be without merit), that fact might seem to establish a dangerous probability of success. No one would incur the cost of litigation to keep a single competitor from the market if there were enough other rivals so that after successful predation the market would remain competitive. A company that undertakes sham litigation, it may be supposed, thereby demonstrates that it thinks itself close to success, and courts could reasonably take the defendant's informed belief as proof enough. In price-fixing cases, after all, courts do not require the plaintiff to prove the defendants' market power, though price fixing by those without market power would be quite harmless, because we suppose that the conspirators know the market best and we take their beliefs as sufficient. That is one of the things that is meant when naked price-fixing is said to be illegal per se. The required showing of "dangerous probability," however, may provide a court with some assurance, otherwise lacking, that the bad faith litigation constitutes an anticompetitive act and is not merely legal harassment for personal motives. In the latter case the appropriate action would be one in tort for abuse of process or malicious prosecution, not one invoking the full panoply of the antitrust laws, including recovery of triple damage. In any case, and whatever the reason, the law does require a dangerous probability of success, and Neumann, in order to prevail, was required to show RECO's share of the relevant market. He did not succeed.

RECO argued that the relevant market encompassed all retaining walls for which RECO competes, a category that RECO claimed was comprised of "retaining walls used for

purposes other than landscaping." Brief for Appellee at 41. Neumann advocated the selection of one of two possible submarkets: (1) "retaining walls in all federal and state highway projects where Reinforced Earth is specified as a sole product or alternate," or (2) "all retaining walls maximum height 20 feet or over." *Id.* at 40-41 (citing Trial Transcript at 2504-05).

Only a small space was provided on the special verdict form for the jury to identify their finding of the relevant market. In that space the jury wrote "retaining walls" without further elaboration. Appellants' Record Excerpts at 70. Elsewhere the jury affirmed that "there was a dangerous probability that [RECO] would achieve monopoly power in the relevant market." *Id.* at 71.

Because of the jury's characterization of the relevant market as consisting of "retaining walls," the district judge found sufficient grounds for granting RECO's judgment n.o.v. motion. The court credited testimony by the president of RECO that the total size of the retaining wall market is around $500 million in sales, and that RECO's total sales ranged from 1.8% to 4.5% of this figure during the period of the patent protest. As a matter of law, a market share this small cannot support an attempted monopolization claim.

Although Neumann initially appeared to accept the fact " 'that the jury has chosen defendant's definition of the relevant market,' " *see* Brief for Appellee at 39, he now contends that the district judge has misinterpreted the verdict. Appellants argue that the jury did not find a market consisting of "all retaining walls," and that even RECO did not argue for such a broad defintion of the relevant market.

Three possible markets were offered to the jury for its

consideration, but there is no means of discerning which one the jury chose, if, indeed, it chose any of the three. The district judge found that the jury's answer accepted RECO's market definition, which as a matter of law entitled RECO to a judgment n.o.v. because of insufficient market share. We are somewhat troubled by this. Neumann had proposed an instruction giving the jury a clear choice of markets, but the district court rejected it and afforded the jury less space than it would have needed to name any of the potential markets suggested by the parties. For that reason, we are loath to affirm on the ground that the jury selected RECO's market definition. We simply are not sure. But there is a separate ground that requires affirmance of the judgment below.

The plaintiff bears the burden of establishing the relevant market. *Walker Process Equipment Co. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 177-78 (1965); *American Bearing Co. v. Litton Industries, Inc.*, 729 F.2d 943, 949 (3d Cir.), *cert. denied*, 105 S. Ct. 178 (1984). Neumann has failed to carry this burden.

One of the markets Neumann suggested — "retaining walls in all federal and state highway projects where Reinforced Earth is specified as a sole product or alternate" — is one in which RECO supposedly commands a 75% share. Neumann justifies the use of this narrow market by stating that:

> If the RECO wall is deemed suitable for the project, the invitation for bids will specify that the system is either required or acceptable. . . . Conversely, if the RECO system is not specified in the bid invitation, federal regulations preclude its use. It is thus entirely logical to define a market as consisting of those highway projects for which the RECO wall is specified.

Reply Brief for Appellants at 24.

This view fails to take account, however, of highway departments that chose not to specify RECO walls because they do not yet know of the design or because they think the job can be done better without a patented wall or with some other patented wall. RECO thus competes not just for jobs where it is specified as acceptable but competes with others to be specified in the first place. Plaintiffs offered no evidence concerning the market of highway proects for which the RECO wall could be specified. Thus, although RECO appeares to win a high percentage of the contracts it bids on, this is not relevant. Neumann has pointed out that RECO, regardless of its cost advantage over conventional systems, works assiduously to broaden the acceptability of its product to public agencies, but has found it difficult to expand in the market. One witness stated his opinion that systems of RECO's general type "will not be broadly accepted for another five to 15 years.' " Brief for Appellants at 18. This clearly indicates that there is a much broader market than the one appellants have defined. It makes no sense to say that an entrant with a new technology has monopoly power by defining the market as those customers whom the entrant has so far managed to persuade. All new entrants, indeed most competitors, would then be monopolists. Neumann has not attempted to show that there is any reason, other than the difficulties of expanding the market for a new product against bureaucratic inertia, why RECO has not already succeeded in the larger market or why it will not eventually penetrate that market. A market limited to projects where the RECO wall is specified is arbitrarily circumscribed and exaggerates RECO's position. *See, e.g., Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 487-89 (5th Cir. 1964).

Neumann's other proposed market definition consisted of all retaining walls over twenty feet in height. Neumann never attempted to show what RECO's share of that market was. This failure condemned Neumann's market to legal insufficiency, *see Olsen v. Progressive Music Supply, Inc.*, 703 F.2d 432, 437 (10th Cir.), *cert. denied*, 464 U.S. 866 (1983), unless RECO's market power could be demonstrated in some other manner. Neumann insists that he did precisely this by producing evidence that RECO was able, among other things, to control prices and restrict entry. *See* Reply Brief for Appellants at 27-29. The jury verdict forecloses that argument. When asked on the special verdict form "Do you find from a preponderance of the evidence that [RECO] had monopoly power in the relevant market, that is, the abiity to control price and exclude competition?", the jury answered "No." Appellants' Record Excerpts at 70.

It is clear, therefore, that Neumann failed to meet his burden of establishing a relevant market against which his claim of attempted monopolization could be tested. The judgment of the district court is, for that reason,

Affirmed.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALBERT NEUMANN, *ET AL.*, Plaintiffs,	)	
	)	Civil Action
v.	)	
	)	No. 81-0459
THE REINFORCED EARTH COMPANY	)	
Defendant.	)	

ORDER

Upon consideration of the defendant's motion for judgment notwithstanding the verdict, and the plaintiffs' opposition thereto, and for the reasons stated in the accompanying memorandum, it is by the Court this 3rd day of July, 1984,

ORDERED that the defendant's motion for judgment notwithstanding the verdict be, and hereby is, granted.

/s/ Oliver Gasch
Judge

FILED
JUL 5 184
JAMES F. DAVEY, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALBERT NEUMANN, *ET AL.*, Plaintiffs,	)	
	)	Civil Action
v.	)	
	)	No. 81-0459
THE REINFORCED EARTH COMPANY	)	
Defendant.	)	

MEMORANDUM

The plaintiffs brought this antitrust case to challenge the filing of a lawsuit by the defendant in the United States District Court for the District of Maryland and a patent protest lodged by the defendant in the United States Patent Office. The plaintiffs are Albert Neumann, inventor of the Tension Retaining Earth System ("TRES") and Mr. Neumann's companies. The defendant is The Reinforced Earth Company ("RECO"), a company that markets in the United States an earth retaining system developed by the French inventor, Henri Vidal.

For some time prior to the events immediately preceding this lawsuit, Mr. Neumann worked for RECO, and in that capacity had access to confidential drawings and trade secrets of RECO. After Mr. Neumann resigned from his employment, RECO learned that he was attempting to market a wall that RECO's executives considered to be suspiciously similar to a wall that RECO had designed and with which Mr. Neumann was familiar. After an investigation of Mr. Neumann's wall, RECO brought an action against Neumann in the United States District Court for the District of Maryland, alleging that Neumann had

stolen trade secrets from RECO. The parties to that lawsuit agreed that the question of whether Mr. Neuman's invention was patentable over other designs would be submitted to the Patent Office for resolution. The Maryland lawsuit and Patent Office protest are the basis of the plaintiff's complaint alleging abuse of process and antitrust violation in the form of sham litigation and an attempt to monopolize or actual monopolization.

Trial in this matter lasted from March 7, 1984 through March 26, 1984. The jury rendered a verdict in favor of RECO on the counts of monopolization and common law abuse of process. On the Special Verdict Form submitted by the Court to the jury, the jury found that the Maryland lawsuit did not constitute sham litigation and also found that the definition of the relevant market was retaining walls, rather than the definitions proffered by the plaintiff, i.e., walls over 20 feet in height or in the alternative, federal and state highway walls on which RECO had bid. The jury did, however, find that the patent protest or request for reconsideration by RECO was a sham, that RECO had attempted to monopolize, that there was a dangerous probability that RECO would achieve monopoly power, that plaintiffs had the intention and preparedness to compete in the relevant market necesasry to establish standing, and that the defendant's attempt to monopolize resulted in $1 million damage to the plaintiffs.

The defendant has now moved for judgment notwithstanding the verdict or in the alternative, for a new trial. They offer four grounds for their motion. The defendant asserts that there is no evidence to support a finding that the patent protest was sham. The defendant also states that a finding of attempted monopolization was impossible by definition because the defendant's market share was

too low to support such a finding. On the question of standing, the defendant asserts that the plaintiffs have made no progress in marketing the patented TRES, have offered no evidence of their preparedness to market TRES regardless of the patent protest, and have failed to put into the record any evidence tending to show that the patent protest caused the difficulties experienced in marketing TRES. Finally, the defendant asserts that there is no competent evidence in the record of plaintiffs' damages.

The legal standard by which the Court must evaluate this motion is set forth in the case of *Vander Zee v. Karabatsos,* 589 F.2d 723 (D.C. Cir. 1978), *cert. denied,* 441 U.S. 962 (1979). The Court may grant JNOV only if "the evidence, together with all inferences that can reasonably be drawn therefrom, is so one-sided that reasonable men could not disagree on the verdict." *Id.*at 726. The verdict may not, however, stand if the plaintiff has not produced any evidence upon which a jury can properly proceed to reach a verdict for the plaintiff. See *Gunning v. Cooley,* 281 U.S. 90, 94 (1930); *Murray v. Towers,* 239 F.2d 914, 915 (D.C. Cir. 1956).

The Patent Protest

The First Amendment protects the right to petition government agencies without fear of retribution. The *Noerr-Pennington* doctrine ensures that courts extend First Amendment Protection to efforts to petition that might otherwise be subject to attack under the antitrust laws. The sham exception to the *Noerr-Pennington* doctrine excludes from First Amendment immunity litigation or other petitioning activity that is frivolous, baseless, or otherwise improper. See *California Transport v. Trucking Unlimited,* 404 U.S. 508, 510-16 (1972); *United Mine*

Workers of America v. Pennington, 381 U.S. 657, 669-70 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139-40 (1961). The sham exception to antitrust immunity established in the *Noerr-Pennington-Trucking Unlimited* line of cases does not extend to genuine attempts to secure government action, even though the motive may be anticompetitive. Thus, the burden is on the plaintiff in this case to show that RECO's purpose in bringing the patent protest and request for reconsideration in the Patent Office was not to obtain a decision on the patentability of Neumann's invention, but that, on the contrary, it was to achieve some purpose outside the patent process, and was itself so baseless or frivolous as to pervert the protest procedure itself. *Federal Prescription Service, Inc. v. American Pharmaceutical Association*, 663 F.2d 253, 262-63 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982).

The sham exception to the *Noerr-Pennington* doctrine as it applies to litigation before agencies and courts, was set forth by the Supreme Court in *California Transport v. Trucking Unlimited*, 404 U.S. 508, 511-16 (1972). It was further explained by the Court of Appeals for the District of Columbia Circuit in *Federal Prescription Services v. American Pharmaceutical Association*, 663 F.2d 253, 262-65 (D.C. Cir. 1981), *cert. denied, 455 U.S. 928 (1982). This latter suit was brought by a mail order prescription company against American Pharmaceutical Association and alleged coconspirators arising from American's nationwide efforts to eliminate mail order prescription services as competitors. The trial court found that American had violated Section 1 of the Sherman Act, 15 U.S.C.* § 1, by conspiring with the Iowa Board of Pharmacy Examiners to harm the plaintiff in its business. The Court of Appeals reversed, holding that the facts of the case reflected

no actionable conspiracy under the antitrust laws. The Court of Appeals reviewed the trial court's application of the *Noerr-Pennington* doctrine and the sham exception thereto. 663 F.2d at 261-68. The Court rejected the contention that " 'the difference between protected activity and sham action depends on the competitive or anticompetitive purpose of exercising the right of petition and [that] evidence of such a purpose is a pattern of actions designed to accomplish the destruction of a competitor.' " *Id.* at 262 (quoting appellee's brief at 31). The Court stated that in addition to anticompetitive intent and "a pattern of actions" the sham exception can only apply where there is proof that the defendant has subverted the integrity of the governmental processes, that the defndant effectively barred the plaintiff's access to these processes, *see also California Transport v. Trucking Unlimited,* 404 U.S. at 515, or that the nature of these processes made invocation something other than the "political activity" that was recognized by the *Noerr-Pennington-Trucking Unlimited* line of cases. *Id.* at 261-68. The Court cited as examples of cases in which the integrity of the government process was subverted, cases involving overtly corrupt conduct, such as bribes and misrepresentations in the adjudicatory process.[1] The Court of Appeals also indicated that where the earlier suit has an outcome favorable to the plaintfiff in that suit, that successful outcome is evidence of the genuineness of the plaintiff's efforts to secure governmental action through that suit. *Federal Prescription Services,* 663 F.2d at 265.

---

[1]Misrepresentations in the legislative process, unlike those in the judicial process, had been found not to amount to subversion of the government process. *California Transport v. Trucking Unlimited,* 404 U.S. at 513.

With these guidelines in mind, the Court turns to the record of the trial in this action in search of evidence of sham litigation. There is no evidence in the record that the plaintiff in the patent protest, The Reinforced Earth Company, in any way subverted the integrity of the Patent Office process by corrupt conduct, such as bribes or misrepresentation. Nor is there any suggestion in the record that RECO barred Mr. Neumann's access to the Patent Office processes. Nevertheless, if RECO's purpose in the Patent Office was in fact, *not* to secure governmental action, but to harm the plaintiff by abusing the relevant government process, then the sham exception may apply. *Id.* at 263. Whether Mr. Neumann in this case has met his burden thus turns on whether he has put in evidence that the Patent Office protest was baseless. See *id.*

At the outset, it should be noted that the protest began by agreement of the parties and had originated as an issue in the Maryland suit,[2] which the parties agreed to remove to the Patent Office. The record shows that Mrr. Rosenberg, Mr. Neumann's patent attorney, discussed the transfer of patent-related issues from the Maryland Court to the Patent Office with Mr. Neumann. Mr. Rosenberg's testimony shows that Mr. Neumann preferred the Patent Office adjudication of the patent issues because that adjudication would be less expensive than a determination by the Maryland Court. In order for RECO to file the patent protest, Mr. Neuman or his attorney had first to

[2]The Maryland suit itself was found not to be sham by the jury in this case.

withdraw the patent from issue.[3] Mr. Rosenberg filed such a petition to withdraw the patent from issue and Judge Miller, presiding judge in the Maryland litigation, was notified of this agreed-upon change in the case by letter from the parties.

The plaintiff has submitted no evidence that would show that The Reinforced Earth Company knew the claim was without merit or acted regardless of the merits of the claim. On the contrary, Assistant Commissioner Tegtmeyer's opinion stated that "it is apparent from a review of the application file that questions are present as to the patentability of the claim as well as to the conduct by, or on behalf of, the applicant." Assistant Commissioner Tegtmeyer granted RECO's request for reconsideration and remanded eight separate issues to the primary examiner for further review. Moreover, the final decision of Assistant Commissioenr Tegtmeyer expressly found that Mr. Rosenberg had been negligent in failing to inform the examiner and the Patent Office about relevant prior art and that he had mischaracterized such prior art once it was discovered. In Mr. Neumann's response to the request for reconsideration, Mr. Neumann's lawyer did suggest that "the addition of this Prior Arts Statement is merely an attempt by the Protestor to delay prosecution in the subject Patent Application, and to delay the issuance of the U.S. Patent directed to the inventive concept of the applicant." The opinion of the plaintiff's own patent attorney as expressed in his reponse to the request for reconsideration,

---

[3]Informal notice of allowance had already been mailed to Neumann on November 2, 1977. Once the notice of allowance has been given and the issue fee paid, the patent issues automatically unless it is withdrawn from issue by the petitioner or the Patent and Trademark Office or its issuance is deferred at the applicant's request. 37 C.F.R. § 1.314.

in the face of numerous pieces of evidence strongly supporting the fact that real issues existed, could not convince a reasonable juror that there were no issues.

Finally, there is the presumption of genuineness created by the petitioner's success in the course of the petitioning activity. See *Federal Prescription Services,* 663 F.2d at 265. The file history of Mr. Neumann's patent indicates that Patent Office officials agreed that genuine issues were in dispute in the protest proceeding. On some of these issues RECO prevailed. The request for reconsideration, for example, was granted. The final decision of the Assistant Commissioner, moreover, found, in accordance with the allegations in RECO's protest, that Mr. Neumann's patent attorney had been negligent in failing to inform the patent examiner and the Patent Office about certain relevant prior art and that he had mischaracterized such prior art once it was discovered. In another opinion, the Assistant Commissioner stated that a review of the application file indicated that questions were present as to patentability. Likewise, in granting The Reinforced Earth Company's request for reconsideration, the Assistant Commissioner found, as RECO had argued, that the examiner should have considered the Don Orione Madonna Wall, the design of which was similar to plaintiff's test wall for which the patent was sought. There was no evidence before the jury on which the jury could make a finding of baselessness. The standard for finding a petitioning activity to have been sham, as enunicated in *Federal Prescription Services,* have not been met here — under any understanding of the evidence adduced at trial. Accordingly, the defendant's motion for JNOV is granted on this ground.

Sufficiency of RECO's Market Share to Support a Finding of Attempted Monopoly

The defendant attacks the verdict on the ground that the market share established for RECO by the undisputed evidence at trial is so small that as a matter of law it precludes a finding of attempted monopolization. For the plaintiffs to establish an attempt to monopolize in violation of Section 2 of the Sherman Act, they must show that the attempt posed a dangerous probability that a monopoly would be established. *Swift & Company v. United States,* 196 U.S. 375, 396 (1905). This requirement in turn necessitates a showing that the defendant have sufficient market power to make it likely that it can achieve the monopoly allegedly attempted. *See* 3 VonKainowski, Antitrust Laws and Trade Regulation § 9.01[2] [rev. perm. ed. 1983). It is generally recognized by the courts that market shares below 30%, absent extraordinary circumstances, cannot support a finding of attempt to monopolize. See *Yoder Brothers, Inc. v. California Florida Plant Corporation,* 537 F.2d 1347, 1369 (5th Cir. 1976), *cert. denied,* 429 U.S. 1094 (1977); *Highland Dairy, Inc. v. Kroger Company,* 402 F.2d 968, 974 (8th Cir. 1968), *cert. denied,*395 U.S. 961 (1969); *cf. United States v. Aluminum Company of America,* 148 F.2d 416, 431 (2d Cir. 1945).

Although the plaintiffs put into evidence lengthy expert testimony on the issue of the relevant market, the jury elected the defendant's definition, that is, "retaining walls." The relevant market argued for by the plaintiffs was retaining walls over 20 feet in height of highway retaining wall projects for which RECO was listed as a source. The jury's answer on the Special Verdict Form made it clear that the jury rejected both of the plaintiffs' definitions.

The only evidence of the size of the relevant market composed of all retaining walls was testimony put in at the trial by David McKittrick, who is the president of RECO, and Jerry DiMaggio, an official of the Federal Highway Administration called as a witness by plaintiff. These witnesses testified that the size of the market for all retaining walls was in excess of $500 million or several million.[4] During the period when the patent protest was pending, 1978-81, RECO's gross sales ranged from $9 million to $22.4 million. As a percentage of the total market size of $500 million, RECO's sales ranged form 1.8 percent of the total market in 1978 to 4.5 percent of the total market in 1981. As discussed previously, a defendant in an antitrust lawsuit with a market share that is uncontrovertedly below 5 percent of the relevant market cannot, as a matter of law, be found to have attempted monopolization. In its charge to the jury the Court instructed that if the jury found a market share below 20 percent, the jury should find no attempted monopolization and the verdict should be in favor of the defendant on this claim. The jury appears to have disregarded this instruction. The Court is now constrained to hold as a matter of law that RECO did not attempt to monopolize in violation of Section 2 of the Sherman Act.

The Plaintiffs' Standing to Sue Under Section 4 of the Clayton Act, 15 U.S.C. § 15

Section 4 of the Clayton Act gives standing to sue to any person who is injured in his business or property by reason

---

[4]Although the plaintiffs argue that the witnesses were testifying in the present tense and put into evidence no testimony on the size of the market in the years in question, the transcript suggests otherwise. Moreover, the testimony of these two witnesses is the only evidence on the question of market size.

of anything forbidden in the antitrust laws. The two-fold standing requirement established by this section was discussed in the case of *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied,* 436 U.S. 959 (1978): the plaintiff must show not only an injury in fact to his business or property, but also a causal connection between that injury and the defendant's allegedly illegal act. *Id.* at 987. As the Court in *Hecht noted,* it is generally not required that a plaintiff actually be engaged in a going business in order to have antitrust standing. He need only manifest an intention to enter the business and demonstrate his preparedness to do so. It is thus necessary to ascertain whether the trial record contains any evidence tending to show Mr. Neumann's preparedness to estabish a business based on the patented TRES and whether there is any evidence to support the conclusion that the delay in issuance of the patent that resulted from the patent protest proximately caused some measurable injury to that business interest.

The *Hecht* Court in drawing the line between promotion and preparedness noted that "the courts have drawn the line at the point where promotion transcends the level of hopes, desires, and expectations, and reaches a certain stage of maturity and concreteness, a stage where it is accompanied by certain indicia of ultimate success." *Id.* at 994. Mere intention to enter a field thus is not enough. The *Hecht* Court went on to state that "[i]ndicia of preparedness include adequate background and experience in the new field, sufficient financial capability to enter it, and the taking of actual and substantial affirmative steps toward entry, 'such as the consummation of relevant contracts and procurement of necessary facilities and equipment.' " *Id.* (quoting *Denver Petroleum Co. v. Shell Oil Co., 306 F. Supp. 289, 308 (D. Colo. 1969)). Moreover,*

the Court went on to state, the negotiation of contracts does not constitute the necessary business. The contracts must be consummated.

When the case at hand is viewed in the light of the Hecht criteria, the Court finds no evidence from which a reasonable juror could find that the plaintiff had the necessary business preparedness to establish standing or that the plaintiff's business failures resulted from the patent protest. All of Neumann's attempts to secure financing from banks and other lending institutions were made and rejected prior to defendant's filing the patent protest. Thus, it is only the potential support from Dur-O-Wall and the Schnabel Foundation Company that the plaintiffs may turn to in an effort to establish preparedness. The testimony of Mr. Welsh of the Dur-O-Wall Company showed that negotiations between Dur-O-Wall and Mr. Neumann terminated after Neumann built his demonstration wall in November 1976. Mr. Welsh stated in his testimony that his reason for breaking off negotiations with Mr. Neumann was the pendency of the Maryland case. The pendency of thr patent protest was not asserted as a reason for terminating the negotiations.

Negotiations with the Schnabel Foundation Company were not commenced until after the patent protest was filed. The reason given for termination of those negotiations was that the Schnabel Foundation Company had better investment opportunities with other products. There was no testimony to the effect that it was the patent protest that influenced the Schnabel Foundation Company to turn to other investment opportunities.

The *Hecht* case requirement of affirmative steps toward entering the market has not been met here. The evidence indicates that the plaintiffs consummated no contract for the sale of the TRES wall at any time prior to, during or

after the patent protest. The plaintiffs thus could offer no evidence to show the financial backing and affirmative steps toward entry that are necessary to establish standing.

Similarly, on the question of causation, the plaintiffs' evidence fails. The plaintiffs' efforts to market Mr. Neumann's wall have been devoted to the unpatented designs, rather than the patented TRES design. Thus, any delays in marketing the unpatented design cannot have resulted from delays in receiving a patent on a design that was never actually marketed even after the patent was issued. Under the criteria outlined in *Hecht v. Pro-Football, Inc.*, the plaintiffs in this case lack standing.

Competency of the Damages Evidence

The defendant has moved to exclude the testimony of Dr. David Schwartzman, plaintiff's expert economist, on the $3 million and $19 milllion estimates of damage to the plaintiffs. The Court admitted this expert testimony over the repeated objections of counsel for the defendant, and the defendant has now renewed its request for a ruling that Dr. Schwartzman's testimony was wholly speculative and that the jury had no competent evidence on which to base a damage calculation.

Dr. Schwarzman's testimony was based on sales projections prepared by Albert Neumann in 1979 when he was trying to enlist the support of the Schnabel Foundation Company in marketing his TRES wall. These projections, according to the testimony of Mr. Neumann, were "a possibility, an aim, completely abstract figure" and "speculation" and a "guess." According to the testimony of Dr. Schwartzman, Dr. Schwartzman did not make any effort to evaluate the reasonabless of the expenses projected by Mr. Neumann.

It was from this basis that Dr. Schwartzman derived his two damage calculations of $3 million and $19 million. Dr. Schwartzman expressed the opinion that the actual damages were closer to the $19 mnillion figure than to the $3 million figure but was unable to state where between the $3 and $19 million figures the actual damages fell. In his depositon as to both damage estimates and at trial as to the $19 million damage estimate, Dr. Schwartzman admitted that he had made no attempt to evaluate competitive response to Albert Neumann's entry into the market.

Dr. Schwartzman's preference for the $19 million damage figure was premised on an assumption that Mr. Neumann would achieve sales of $214,000 per month in April 1977. The testimony of Albert Neumann himself, however, indicated that two months prior to April 1977 no contracts were expected to be entered into by April of 1977. Likewise, the $3 million damages projection anticipated expenses in the first year totaling $38,000, and the evidence indicated that the only possible money available to cover any portion of those expenses was a $30,000 loan sought from C.E.D.A., which loan would have been predicated on Mr. Neumann's obtaining an approval letter for his wall from the Maryland Department of Transportation, a letter Mr. Neumann stated he never sought.

The wall on which the Neumann projections were based was the Richardson wall. Dr. Schwartzman stated that his estimate was based on a patented product. The Richardson wall is not the patented TRES and did not exist in 1977 or 1978, the first two years of the Schwartzman estimates.

Moreover, as noted above, the jury at the trial on this matter found that the Maryland litigation was not a violation of the antitrust laws. Yet underlying the damage estimates submitted by Dr. Schwartzman was the assump-

tion that both the Maryland suit and the patent protest were cause of the damage. No effort was made to differentiate between damage caused by the patent protest and damage caused by the Maryland litigation in the damage estimate offered by this expert.

In antitrust cases it is admittedly difficult to establish damages with mathematical precision, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969), Nevertheless, the plaintiffs in an antitrust suit must submit for the jury's consideration damage estimates that are based on more than "mere speculation or guesswork." *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946); *Smith v. Pro-Football, Inc.*, 593 F.2d 1173, 1189 (D.C. Cir. 1978). At the trial in this matter the Court repeatedly asked counsel for the plaintiff to submit for the jury's consideration damage estimates based on a foundation grounded in real world market conditions and the plaintiffs own actual situation and relationship to that market. Only in this manner could the expert arrive at an estimate that would avoid the taint of speculativeness that appeared to afflict the expert testimony on this matter. This the plaintiff failed to do.[5] The Court therefore rules the expert testimony on damages to be incompetent and finds that there is absent from the record of the trial in this matter any competent evidence upon which a damage calculation could be based.

---

[5]Demonstrative of the kind of speculativeness that characterized these damage estimates was the expert's decision simply to take figures projected for one four year period and move them back to the four year period for which projections were here required – without raising any question about or compensating for how the retaining wall market and other factors might have differed for the two periods.

CONCLUSION

The Court has reviewed the record in this case and the memoranda submitted by the parties in support of and in opposition to the motion for JNOV. The record of the evidence adduced at trial leads to the inescapable conclusion that reasonable minds could not differ. The patent protest clearly was not sham, and no attempt to monopolize occurred. Moreover, the evidence does not permit a finding that the plaintiffs had the necessary business preparedness to enter the retaining wall market or that the patent protest resulted in any injury to the plaintiffs. There is furthermore no competent evidence in this record from which the jury could arrive at a damage figure. Accordingly, the defendant's motion for JNOV must be granted.

/s/ Oliver Gasch
Judge

Date: July 3rd, 1984

APPENDIX D

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Testimony of David Mitchell

* * * introduced to it.

Q. Are you aware of alternate systems other than the system designed by the Reinforced Earth Company for retained walls?

A. Yes, I am.

Q. And, again, I direct your attention to what you've referred to as unconventional walls, plaintiffs' Exhibit 129. Are you familiar when VSL Retained Earth first entered into the market?

A. Yes.

Q. When was that?

A. In fact, I think they contacted us probably first about — we were probably the first people in the department to be contacted.

Q. Do you recall when that was?

A. No, I sure don't. Must have been in '80, I guess. May have been before that. I'm not sure. I could find the exact date, I guess, but it must have been either '79 or '80, I guess is when it was.

Q. Are you aware of when Georgia first introduced its first stabilizing system?

A. Say that again.

Q. Are you aware of when Georgia first introduced its own stabilized earth system?

A. Yes.

Q. And what date was that?

A. We started on it last year, '81.

Q. And how long has slurry walls been utilized by the department?

A. We've only built two of those. We started thinking about those in about '75.

Q. You said you've only built two of those walls. Why have you built just two?

A. They are relatively more expensive than other wall types, and there are certain sites that you run across where they're particularly good, but we just haven't run across that many sites where they appear to be as economical as other types of walls.

Q. Referring to permanent earth anchors, when was that first introduced into the department as an alternative retaining earth wall?

A. About '72, I guess. Well, I've been liking permanent earth anchors a good while, but they weren't — to begin with, they weren't designed — they were designed as temporary anchors, the walls were, rather than permanent. They've only recently decided that they could design them permanently now, and since about '75, they've done permanent anchors — or I've heard about it since '75.

Drill shafts, when were they first introduced to the department as an alternative system?

A. About '75, again. Those are a series of overlapping drill shafts that form a wall. I was just thinking about that thing. Since this time I think we built one.

Q. Mr. Mitchell, are you familiar with Double Wall?

A. Yes, right.

Q. And do you know when that system was first introduced into the department?

A. Under the name Double Wall, I think in about 1979, I guess.

Q. You said under the name Double Wall?

A. Yeah.

Q. Was it referred to as some other system prior to 1979?

A. Well, I'm not that familiar with them, but they were a bin wall company, I think, to begin with, and then they changed – picked up the trade name of Double Wall. I think about '79 that I first heard about it. I'm not sure about the dates.

Q. And the last one, Gabion Walls, when was that introduced into the department?

A. We've never used that, but that's a basket full of rocks.

Q. Mr. Mitchell, directing your attention to the unconventional walls, which you've previously described, would these all be considered substitute walls to the structure designed by the Reinforced Earth Company?

A. They would – not all of them would be appropriate for every site –

Q. What –

A. – as far as the design.

Q. What factors – if I can help you, what factors would you take into consideration in determining which system should be utilized on any particular project?

A. It would really depend on how the system – how they were bid, I guesss, more than anything else to determine which one would be the most economical, but in our minds there's certain types of wall that would be more suitable to retained cut sections where you're cutting in existing ground rather than fill sections. Reinforced earth and retained earth and panel walls and double – well, mainly reinforced earth and retained earth and Georgia

stabilized earth walls are suitable – suitable for retaining fills.

Q. Mr. Mitchell, you defined the category of conventional walls, and I believe you described those as being gravity walls, thin walls –

A. And can –

Q. – cantilever?

A. Reinforced concrete cantilever walls.

Q. What are the determining factors that would decide whether or not you would use a conventional wall as opposed to an unconventional wall for a particular project? What structural considerations are taken into consideration?

A. Right now it's economics. The unconventional walls are often – we've found – or at least the bridge department's found that the unconventional wall's often cheaper than our so-called conventional walls.

Q. Let me ask you this: Would height be a factor in the selection of a conventional as opposed to an unconventional wall?

A. Should I go ahead and answer that?

MR. MATSON: Yes. He's noted his objection. You can answer now.

A. Yes, it would certainly be a factor.

Q. Any other factors or variables that would be taken into consideration?

A. The type material that you were retaining, the type material that you were trying to retain.

Q. Would soil composition be a factor?

A. Yeah, right. Soil composition would be a factor.

Q. Mr. Mitchell, in the preparation of plans which were

let for bidding, what systems for building retaining walls would be considered by the department?

A. What systems – people from bridge design can answer that question better than I can. I think now we're considering double walls and tie back walls, reinforced earth * * *

Testimony of Gregory Richardson

* * * bench.

THE COURT: Yes.

(AT THE BENCH.)

MR. McMILLAN: Your honor, to describe what the market would be like in 1976 and 1977, I asked for a cost comparison if he was able to make it between the cost of different systems; I didn't ask him to describe the marketplace.

MR. TAYLOR: Your Honor, I respectfully differ.

Mr. McMillan specifically asked, are you aware of new competitors who have come into the market within the last four to five years; who are they, name them.

This gentleman indicated that not one of those competitors was around in 1977. I have a right to bring that out on redirect.

MR. McMILLAN: I don't have any objection to the question but that is not the question he asked, Your Honor. He asked to describe the market situation in 1977, and that's the type of question that a soils engineer is not competent to handle.

THE COURT: You may rephrase your question.

(IN OPEN COURT, JURY PRESENT.)

BY MR. TAYLOR:

Q. Dr. Richardson, of the competitors which you identified as having come into the market within the last five years, which of those competitors to The Reinforced Earth Company were in the marketplace in 1977 when Albert Neumann sought to enter the market?

A. VSL was not in the market. Doublewal was producing a smaller system. They had not gone to the large wall system. Certainly the Tensar and some of the plastics were not involved in the marketplace.

I think at that time the market was much mroe conservative. Reinforced Earth had been a very dramatic change, and had been forced to pay their dues and had opened up an awareness that there may be alternative techniques.

At that time, however, there were no other systems as compared to today where the market is becoming quite crowded.

Testimony of David Schwartzman

MR. MANSULLA: I understand the Court's ruling, Your Honor.

THE COURT: All right. Bring in the jury.

(IN OPEN COURT, JURY PRESENT.)

THE COURT: Good morning, ladies and gentlemen.

MR. TAYLOR: Your Honor, we would like to continue our direct examination of Dr. Schwartzman.

THE COURT: All right.

DR. DAVID SCHWARTZMAN,

a witness recalled for examination, having been previously duly sworn, was examined and testified further as follows:

BEST AVAI

DIRECT EXAMINATION (RESUMED)

BY MR. TAYLOR:

Q. Good morning, Dr. Schwartzman.

A. Good morning.

Q. I believe when we had stopped yesterday, you had bene discussing barriers to entry. I had asked you about what barriers to entry did you determine existed.

A. I was discussing barriers to entry, and I was suggesting that RECO's efforts on the basis of its patent right, RECO's efforts to keep out competitors had made entry difficult.

The examples that are shown in the depositions include the efforts by the California Department of Transportation to introduce its mechanically stabilized system for retaining walls.

This was and is an alternative technology to Reinforced Wall which results in similar economies with the Reinforced Earth technology.

In other words, it's quite competitive with Reinforced Earth.

Now, before California could introduce this technique, it had to negotiate an agreement with RECO, and as a result of this agreement, California Department was prohibited from disseminating information about the technique except at request. So that RECO was trying to protect itself against competition from alternative techniques through its patent claim.

Q. Dr. Schwartzman, at this point I would like to show you what has been marked as Plaintiffs' Exhibit No. 419 and which is presently in evidence.

Would you identify that document, please.

LABLE COPY

A. Yes. This is the licensing agreement dated 27 March 1976 between Reinforced Earth Company and the Department of Transportation, State of California.

Q. What other similar situations did you find in determining what barriers to entry existed?

A. The Department of Transportation in Georgia also wished to introduce a competitive technique. They, according to Mr. Rives, who is a member of the Department of Transportation in the State of Georgia, believed that RECO's prices were excessive and they also wanted to develop competition in the market for retaining walls.

They developed their own version of the California system. It was quite similar. And before they could introduce that technique, they had to enter into negotiations also with RECO and they only were given permission — the state was only given permission to build retaining walls using the mechanically stabilized embankment system after agreeing that they would limit construction to the Atlanta Metropolitan Region. In other words, the Department of Transportation could not even — was not even allowed to build retaining wall using this alternative system in the state as a whole. It was limited to the Atlanta Metropolitan Region. So that is another instance in which entry was restricted.

Q. Dr. Schwartzman, I would like to hand you what has been marked as Plaintiffs' Exhibit 420 and which is presently in evidence.

Would you identify that document?

A. The heading is "Sublicensing Agreement," and it is dated the 4th day of November 1982. It is between the Georgia Department of Transportation and the Reinforced Earth Company.

Q. Is that the sublicensing agreement to which you had earlier referred?

A. Yes.

Q. Were there any additional sublicenses?

. VSL Corporation also is a sublicensee of the Reinforced Earth Company and they have developed another version of the California mechanically stabilized embankment system. They entered into a sublicensing agreement with RECO and couldn't go ahead until they had entered into this agreement; and as a result of the agreement, they were permitted to market the system.

Q. I would like to hand you what has been marked as Plaintiffs' Exhibit 421(A), which is presently in evidence.

Would you identify that document, please?

A. It's headed "Agreement." It is dated October 5, 1982. It is between the Reinforced Earth Company and VSL Corporation.

Jury Instructions

Plaintiff also alleges that if Reinforced Earth did not monopolize the relevant market, it attempted to monopolize the relevant market. The offense of attempted monopolization under Section 2 requires that plaintiff prove the following elements: One, a specific intent to acquire monopoly power within the relevant market. Two, predatory or other anticompetitive acts directed toward accomplishing the unlawful purpose. Three, the acts in question must be such that although not successful in achieving monopoly power, they nevertheless came sufficiently close to the achievement of monopoly power so as to create a dangerous probability of successful monopolization. Four, plaintiff must have suffered quantifiable injury as a result of the attempted monopolization.

In determining whether there has been monopolization or attempted monopolization in violation of Section 2 of the Sherman Act, you will have to consider various issues. First, you must determine the relevant market. Identification of the relevant market is important, because only after you have identified the relevant market can you determine whether there has been monopolization or an attempted monopolization of that market.

Let me generally define the notion of relevant market. Plaintiffs claim that defendant has unreasonably * * *

* * * certain additional instructions dealing specifically with attempts to monopolize to permit you properly to determine whether defendant did or did not attempt to monopolize the relevant market.

The test for defining the relevant market is the same for attempts to monopolize as it is for cases involving actual monopolization. In either case, the first question should be to monopolize what? The issues of monopoly and attempted monopoly cannot be decided in a vacuum, and require that you first define the relevant market.

Once you have defined the relevant market, you must consider the three elements that plaintiffs must prove in order to make out an attempt to monopolize. First, has plaintiff proven that there was a dangerous probability that defendant would have obtained a monopoly and, second, has plaintiff proven predatory or other anticompetitive acts directed toward accomplishing an unlawful purpose? And, third, has plaintiff proven that defendant had specific intent to monopolize.

An attempt to monopolize in violation of Section 2 requires proof of a specific intent to monopolize evidenced by conduct or acts from which such an intent can be inferred. Thus, proof of the dangerous probability that the at-

tempted monopolization might have succeeded even if it did not. An attempt to monopolize is a separate offense from actual monopolization. Section 2 of the Sherman Act makes it unlawful to monopolize or to attempt to monopolize any part of the trade or commerce of the United States. As you will see, the elements of the two offenses differ in some important respects. It is, therefore, possible to commit either offense without the other.

It is also possible to commit both. Even if you do not find that the defendant monopolized or had monopoly power, you may find that defendants committed the offense of attempted monopolization.

In attempted monopolization specific intent is the intent to destroy competition and build a monopoly. The dangerous probability requirement means the use of methods, means, or practices which although they fall short of actual monopolization nevertheless approach so close to actual monopolization as to make it unlikely – make it likely that they will succeed. Things which are done for a normal business purpose and things which are common among firms in particular industries, for example, protecting patent rights or ensuring that confidential proprietary information is not disclosed into the public domain, are not predatory acts.

Predatory acts, on the other hand, generally have no valid economic or social vlaue.

In determining whether or not there was a dangerous***

Supreme Court, U.S.
FILED
AUG 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-132

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

ALBERT NEUMANN, *et al.*,
Petitioners,

v.

REINFORCED EARTH COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD MCMILLAN, JR.*
CLIFTON S. ELGARTEN
DAVID B. SIEGEL
LAURIE T. BAULIG
CROWELL & MORING
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036
Attorneys for Respondent
The Reinforced Earth Company

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
COUNTERSTATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	4
CONCLUSION	9

TABLE OF AUTHORITIES

CASES Page

American Bearing Co. v. Litton Indus., 729 F.2d 943 (3d Cir.), *cert. denied*, —— U.S. ——, 105 S. Ct. 178 (1984) 6

Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480 (5th Cir. 1984) 7

E.J. Delaney Corp. v. Bonne Bell, Inc., 525 F.2d 296 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976) 7-8

FLM Collision Parts, Inc. v. Ford Motor Co., 543 F.2d 1019 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977) 7

Hiland Dairy, Inc. v. Kroger Co., 402 F.2d 968 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969) 6

Jayco Systems v. Savin Business Mach. Corp., 777 F.2d 306 (5th Cir. 1985) 7

Olsen v. Progressive Music Supply, Inc., 703 F.2d 432 (10th Cir.), *cert. denied*, 464 U.S. 866 (1983) 7

Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986) 6

Shoppin' Bag of Pueblo, Inc. v. Dillon Cos., 783 F.2d 159 (10th Cir. 1986) 7

Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979) 7

Swift & Co. v. United States, 196 U.S. 375 (1905) 5

United States v. Grinnell Corp., 384 U.S. 563 (1966) 6

Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965) 6

Yoder Bros. v. California-Florida Plant Corp., 537 F.2d 1347 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977) 6

STATUTES

Sherman Act, 15 U.S.C. § 2 (1982) 5

OTHER AUTHORITIES

3 P. Areeda & D. Turner, *Antitrust Law* ¶ 831 (1978) 5, 6

16B J. Von Kalinowski, *Antitrust Laws and Trade Regulation* § 901[2] (1986) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-132

ALBERT NEUMANN, *et al.*,
Petitioners,

v.

REINFORCED EARTH COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

Petitioners brought this action in the United States District Court for the District of Columbia, alleging that Respondent [1] had "monopolized" or "attempted to monopolize" by prosecuting a sham patent protest in the Patent and Trademark Office and related court litigation. The jury rejected the monopoly claim and a common law abuse of process claim, but found for Petitioners on the

---

[1] Pursuant to Supreme Court Rule 28.1, Respondent Reinforced Earth Company (RECO) has no parent or subsidiary corporation. RECO is a 50% owner of "RECOSOL," a joint venture.

"attempt to monopolize" claim. Nonetheless, the trial court held the jury verdict on "attempt to monopolize" was not supported by the evidence.

In granting judgment for Respondent, the trial court held that Petitioners had failed to demonstrate that Respondent's conduct fell within the sham exception to First Amendment protection for access to the courts and federal agencies because (1) the litigation had been at least partially successful, App. at 22a,[2] and (2) there was no evidence that Respondent had prosecuted the protest with knowledge that its claims were without merit. App. at 21a. In addition, the court held that Petitioners lacked standing to bring an antitrust suit because Petitioners never possessed the resources or ability to begin marketing their product, App. at 26a-27a, and therefore were not injured by any action of Respondent.[3] Finally, the district court held that the "attempt to monopolize" claim could not be sustained by the evidence because of Petitioners' failure to demonstrate a dangerous probability of monopoly in the relevant market. App. at 24a.

Two points, not emphasized by the Petitioners, bear emphasis. *First*, the jury returned a verdict rejecting Petitioners' claim that Respondent had the power to control prices and restrict entry. *Second*, the jury was asked to return a series of special interrogatory answers with its verdict. Those interrogatory answers provided some assistance in interpreting the verdict on the issue of attempted monopolization. Using those special interrogatories as a guide, the district court found it evident that the jury had adopted precisely the definition of the

---

[2] The decisions of the court of appeals and the district court are found in Petitioners' Petition for Writ of Certiorari ("Pet.") in Appendices B and C, herein referred to as "App."

[3] The court also held that Petitioners' damages proof was speculative as a matter of law. In so holding, the district court found a complete absence in the trial record of "any competent evidence upon which a damage calculation could be based." App. at 29a.

relevant market that *Respondent* had proposed. App. at 23a.

Under that definition of the relevant market, Petitioners had not sustained their burden of demonstrating that Respondent used sham litigation in an attempt to monopolize. Even assuming that Respondent had acted with some form of predatory intent, Respondent's actions nevertheless did not present a dangerous probability of monopoly, an established element to a charge of attempted monopolization. The district court, therefore, granted judgment notwithstanding the verdict to Respondent on the attempt to monopolize count. App. at 24a.

On appeal, Petitioners challenged each of the four independent bases supporting the district court's entry of judgment: specifically, the district court's conclusion that there had been no evidence to support a "sham litigation" challenge, that Petitioners lacked standing to maintain the action, that they had failed to demonstrate a dangerous probability of monopoly, and that their damages proof was incompetent as a matter of law. On the dangerous probability point now pressed in this Court, Petitioners raised various challenges to the district court's market analysis, eventually raising a procedural question about the district court's reliance on the jury's interrogatory answers, claiming that the layout of the special interrogatory form did not allow sufficient room to describe alternative markets.

The court of appeals declined to reach the sham litigation, standing or damages issues, each of which remains an independent basis for the district court's entry of a judgment notwithstanding the verdict. App. at 5a. The court of appeals found that legal deficiencies in Petitioners' market definition were alone sufficient to sustain the district court's judgment. App. at 13a. The appellate court had no difficulty recognizing that if the jury found

that the relevant market was simply "retaining walls"—as the jury stated in the special verdict form, as Respondent had proposed, as Respondent's experts had testified, as Petitioners initially conceded,[4] and as the trial judge concluded that the jury expressly found—then Petitioners had failed to demonstrate that Respondent's conduct presented a dangerous probability of monopoly: Respondent's share of that market was miniscule.[5] But concerned about the manner of evaluating the technical challenge to the layout of the interrogatory form, the court went on to find a more fundamental defect in Petitioners' "attempt to monopolize" theory. Even assuming that the trial court erred in relying on the jury's finding that the market was "retaining walls," or that *that* finding was improperly rendered, the court held that the alternative theories of the relevant market advanced by Petitioners were not legally viable on their own terms. App. at 11a-13a. It appears to be primarily this aspect of the court of appeals' opinion on which Petitioners focus their challenge.

REASONS FOR DENYING THE WRIT

This Petition raises no novel or important question of law, nor any issue upon which the courts of appeals have divided, nor upon which this Court has rendered directions contrary to those followed by the courts below. On the contrary, the judgment below is grounded firmly on well-established antitrust principles. It concerns only the case-specific issues of reconciling a jury verdict with the

---

[4] In raising the issue in the circuit court, Petitioners took a position directly contrary to that taken in the district court, where Petitioners' counsel conceded that "the jury has chosen defendant's definition of the market." App. at 10a (citing Brief for Appellee at 39).

[5] The testimony was that the retaining wall market had sales of approximately $500 million, and that Respondent's total sales ranged from 1.8%-4.5% of this figure during the relevant period. App. at 10a.

absence of evidence that would support that verdict, and of reconciling special jury interrogatory answers with a verdict facially inconsistent with those interrogatory answers. The alleged error in interpreting the jury's findings, Pet. at 5-8, presents no issue of law, and does not raise the kind of issue that this Court generally reviews. Equally important, given the case-specific issue that Petitioners seek to raise, it is plain that the case was carefully and correctly decided below.

Although Petitioners intimate that the offense of "attempt to monopolize" requires "clarification," Pet. at 11, Judge Bork's opinion makes it clear that there is substantial unanimity of opinion on the principal characteristics of the offense. Among the uniformly recognized elements of the offense is that the predatory action in question must have created a "dangerous probability" that a monopoly would be achieved. The "dangerous probability" requirement was established by this Court more than eighty years ago in *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905). The existence of this requirement of the offense is not challenged by Petitioners.

The rationale for that requirement is also relatively clear. Section 2 of the Sherman Act is concerned only with real or threatened monopolies. 15 U.S.C. § 2 (1982). Before it can be said that a competitor's act might result in a monopoly, that competitor must have some considerable significance in the market. *See* 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 831 at 335-36 (1978). If it does not present a threat of monopoly—whatever the nature of the act alleged and whatever remedies may be afforded by other laws for such conduct—it is not something about which the federal courts are concerned under the Sherman Act. *See* App. at 9a.

Thus, before Petitioners can make out a case of attempt to monopolize, "the would-be monopolist must possess 'a measure of power in the relevant market.'" App. at 8a

(quoting 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 831 at 336). Absent the most exceptional circumstances, the potential power to monopolize could not realistically be present absent some meaningful market share. Indeed, it is uniformly recognized that market power is determined, at least in large measure, by the share of the market held. *See United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966). It was on these shoals that Petitioners' claim necessarily foundered.

As Judge Bork noted, Professors Areeda and Turner have concluded that a market share of less than 30% is presumptively inconsistent with any suggestion that a competitor will, through his anticompetitive acts, make a monopoly "dangerously probable." App. at 8a. The cases and other commentators agree that a competitor with minimal market share poses no threat of monopoly as a matter of law. *See Yoder Bros. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1368-69 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977); *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968, 974 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969), 16B J. Von Kalinowski, *Antitrust Laws and Trade Regulation* § 9.01[2] (1986); *cf., Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 216-17 (D.C. Cir. 1986). The less than 5% that Respondent held in the market apparently chosen by the jury was not close to the threshold market share.

But even if some alternative market proposed by Petitioners had been chosen by the jury, the verdict could not stand. Petitioners' two proffered definitions were not legally viable and, therefore, Petitioners failed in their well-recognized burden of demonstrating power in the relevant market by a preponderance of the evidence. *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177-78 (1965); *American Bearing Co. v. Litton Indus.*, 729 F.2d 943, 949 (3d Cir.), *cert. denied*, —— U.S. ——, 105 S. Ct. 178 (1984). The first choice of

Petitioners, "retaining walls in all federal and state highway projects where Reinforced Earth is specified as a sole product or alternate," App. at 11a, was "arbitrarily circumscribed," App. at 12a, because the proposed market merely counts successes (when Respondent was permitted to bid) and ignores failures (when it was not allowed to bid[6] or did not even know of the competition). Judge Bork aptly summarized the state of the record by concluding that "[i]t makes no sense to say that an entrant with a new technology has monopoly power by defining the market as those customers whom the entrant has so far managed to persuade." App. at 12a. Accordingly, the market share data created by this definition was meaningless. *See, e.g., Jayco Systems v. Savin Business Mach. Corp.*, 777 F.2d 306, 319-20 (5th Cir. 1985); *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 487-89 (5th Cir. 1984).

The final alternative suggested by Petitioners—retaining walls over 20 feet—was equally unavailing, for in this market Petitioners had failed to offer any evidence whatsoever of Respondent's share of the market. The failure to offer any evidence of market share is well-established as a failure to meet the burden of proof imposed by the cases on a plaintiff presenting an "attempt to monopolize" theory. App. at 13a. *See Shoppin' Bag of Pueblo, Inc. v. Dillon Cos.*, 783 F.2d 159, 161-62 (10th Cir. 1986); *Olsen v. Progressive Music Supply, Inc.*, 703 F.2d 432, 436-37 (10th Cir.), *cert. denied*, 464 U.S. 866 (1983); *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 276, 284-86 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979); *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1030 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); *E.J. Delaney Corp. v.*

---

[6] One of Petitioners' own witnesses, for example, testified that systems of Respondent's general type "will not be broadly accepted for another five to 15 years." App. at 12a (citing Brief for Appellants at 18).

Bonne Bell, Inc., 525 F.2d 296, 306-07 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976).

Significantly, Judge Bork disdained absolute reliance on the market share theory and proof of market share, leaving open alternative avenues of proof of market power. App. at 13a. But the only alternative avenue of proof cited by Petitioners—the alleged proof that Respondent could control prices and restrict entry, Pet. at 9—was inconsistent with the jury's special findings: the jury expressly found that Petitioners did *not* have this power. App. at 13a (citing Appellants' Record Excerpts at 70). With respect to *this* jury finding, Petitioners could not make the argument that the layout of the jury form did not allow the jury adequately to express itself.

Petitioners point out that whereas the offense of monopolization requires the power "to control prices and exclude competition," the offense of attempted monopolization does not. In this regard, Petitioners argue that the court below erred in holding that only if a competitor has achieved the power to control prices and exclude competition can it be guilty of the offense of *attempted monopolization.*

The court of appeals did not make the error of which it is accused. The court of appeals implicitly recognized that a market share less than that required to "monopolize" would suffice for the offense of attempt. And it even recognized that under some circumstances, no proof of market share might be required. The court merely held that in the circumstances of this case, those special conditions were not present. App. at 13a. The court of appeals' only reference to the "ability to control price and exclude competition," App. at 13a, was in reference to *Petitioners' own contention* that it had established that Respondent had that power, and that Petitioners were thereby relieved of the burden of showing that Respondent had a significant market share. It was only to respond

to Petitioners' ineffectual choice of alternative theories that the court was required to make reference to the jury interrogatory on the ability to "control price and exclude competition." App. at 13a. The court below did not fail to appreciate the distinction between "monopolization" and "attempt to monopolize."

CONCLUSION

For the above-stated reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD MCMILLAN, JR.*
CLIFTON S. ELGARTEN
DAVID B. SIEGEL
LAURIE T. BAULIG
CROWELL & MORING
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 452-5800
Attorneys for Respondent
The Reinforced Earth Company

* Counsel of Record

August 26, 1986